

## **REMARKS**

### **Allowed and Allowable Claims**

Claims 14-17, 19, 28, 29, 35-39, 62 and 63 have been allowed. Claims 57-59 have been objected to, but have been indicated as allowable if rewritten in independent form. To that end, the Applicant has rewritten claims 57 and 59 in independent form. Accordingly, allowance of claims 57-59 is respectfully requested. Additionally, independent base claim 56 has been cancelled without prejudice for possible submission in a continuing application.

### **Election/Restriction**

Claim 64 has been withdrawn from consideration as being drawn to a non-elected invention. The Applicant has cancelled dependent claim 64 without prejudice for possible submission in a continuing application.

### **Claim Rejections – 35 USC §§ 102 and 103**

Claim 56 has been rejected under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. 5,405,359 to Pierce, and claims 1-13, 18, 21-27, 60 and 61 have been rejected under 35 U.S.C. §103(a) as being unpatentable over Pierce.

### **Claim Amendments**

As indicated above, claims 57 and 59 have been rewritten in independent form and independent claim 56 has been cancelled without prejudice. Independent claim 1 has been amended to include the subject matter of dependent claims 2-5 and 21, and dependent claims 2-5 and 21 have been cancelled without prejudice for possible submission in a continuing application. Dependent claims 8, 10, 12 and 22-24 have been amended to conform to the antecedent basis established in independent base claim 1. Additionally, claims 25-27, 60 and 61 have also been cancelled without prejudice for possible submission in a continuing application.

### **Arguments in Support of Patentability**

As indicated above, independent claim 1 has been amended to include the subject matter of dependent claims 2-5 and 21, and dependent claims 2-5 and 21 have been cancelled without prejudice for possible submission in a continuing application. Additionally, independent claim 1

has been amended to remove the language added to claim 1 in Applicant's previous response to the non-final Office Action dated November 29, 2007. The Applicant notes that the language added to independent claim 1 was present in dependent claims 2-5 and 21. Accordingly, the Applicant submits that the amendments to independent claim 1 do not raise any new issues that would require further consideration and/or searching.

With regard to independent claim 1, the Office Action admits that "Pierce fails to teach a triangular-shaped arrangement or a parallel relationship of the at least three anchor member". (See Item 10 of the Office Action). Nevertheless, the Office Action asserts that "it would have been obvious . . . to use a triangular-shaped arrangement or a parallel relationship because the shape of the arrangement is a mere design choice and that any shape would perform equally well". (See Item 10 of the Office Action).

The Applicant respectfully disagrees with the assertion that "it would have been obvious . . . to use a triangular-shaped arrangement or a parallel relationship because the shape of the arrangement is a mere design choice and that any shape would perform equally well". As an initial matter, the Applicant notes that the Office Action fails to set forth sufficient grounds to establish a *prima facie* case of obviousness. Specifically, the assertion that it would have been obvious to use a triangular-shaped arrangement or a parallel relationship of the anchor members "because the shape of the arrangement is a mere design choice and that any shape would perform equally well" does not set forth specific grounds sufficient to establish a *prima facie* case of obviousness. Indeed, the basis for this assertion is merely conclusory, and does not provide specific reasoning or rationale that adequately support the underlying claim rejections.

Additionally, the assertion that "it would have been obvious . . . to use a triangular-shaped arrangement or a parallel relationship" of the anchor members totally disregards a significant aspect of the claimed invention of independent claim 1, and also fails to recognize the shortcomings and/or limitations of the Pierce device. Specifically, both the triangular-shaped arrangement and the side-by-side arrangement of the anchor members recited in independent claim 1 results in an expanded configuration that is denser/more compact than the anchor configuration illustrated in Figures 32-35 of Pierce to thereby provide a dense/compact expanded configuration that will not pass through the aperture A in the cortical bone layer L. (See Figures 5 and 9 of the as-filed application). However, as shown in Figure 35 of Pierce, the toggle

wedges are angled so that the barbed tips 5 bite into the tissue D to anchor the suture C to the tissue D. Although the toggle wedges are transitioned to an angled orientation, the wedges are still aligned in a generally axial/serial arrangement relative to one another, and unlike the anchor assembly recited in independent claim 1, the toggle wedges are not transitioned to a denser/more compact configuration (i.e., a triangular-shaped or side-by-side arrangement) to prevent passage of the toggle wedge system back through the axial opening in the tissue D.

Moreover, the toggle wedges of the Pierce device rely on precise interaction between the toggle wedges and the plunger B and interaction of the toggle wedges relative to one another to orient the anchor members at a particular angle to force the barbed tips 5 of the toggle wedges to bite into adjacent tissue D. The Pierce system therefore has a level of complexity that is not found in the anchoring system of independent claim 1. Specifically, the anchoring system of independent claim 1 does not rely on precise interaction of between the anchor members to orient the anchor members at a particular angle to cause the ends of the anchor members to bite into adjacent tissue, but instead relies on transitioning of the anchor assembly from a substantially linear arrangement to a triangular-shaped or side-by-side arrangement to thereby provide a denser/more compact configuration that prevents passage of the anchor assembly through the aperture in the cortical bone layer. Furthermore, the Applicant submits that the toggle wedge system disclosed in Pierce is not even physically capable of being transitioned to a triangular-shaped or side-by-side arrangement, nor does the Office Action set forth any basis or rationale as to how the Pierce device could in any way transition the toggle wedges to a triangular-shaped or side-by-side arrangement. Indeed, the Pierce device merely includes a pair of toggle wedges that are interconnected in series via a suture C, but does not include the elements or features necessary to transition the toggle wedges to a triangular-shaped or side-by-side arrangement.

For at least the reasons set forth above, it would not have been a matter of mere design choice to modify the Pierce device to arrive at the anchoring system recited in independent claim 1. Accordingly, withdrawal of the rejection of independent claim 1 and allowance of the same is respectfully requested. Claims 6-13, 18 and 22-24 depend from independent claim 1 and are submitted to be patentable for at least the reasons supporting the patentability of independent base claim 1.

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**CONCLUSION**

In view of the foregoing amendments and remarks, it is respectfully submitted that the Applicant's application is now in condition for allowance with pending claims 1, 6-19, 22-24, 28, 29, 35-39, 57-59, 62 and 63.

Reconsideration of the subject application is respectfully requested. Timely action towards a Notice of Allowability is hereby solicited. The Examiner is encouraged to contact the undersigned by telephone to resolve any outstanding matters concerning the subject application.

Respectfully submitted,

By: 

Brad A. Schepers  
Registration No. 45,431  
Krieg DeVault LLP  
One Indiana Square, Suite 2800  
Indianapolis, IN 46204-2079  
(317) 238-6334